

34886-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CURTIS LEE SMITH,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentencing of the Appellant.

III. ISSUE

Did the superior court abuse its authority in amending the judgment and sentence consistent with its original intent to include standard community custody conditions requiring the SSOSA Defendant submit to the authority of the Department of Corrections?

IV. STATEMENT OF THE CASE

The Defendant/Appellant Curtis Lee Smith was charged with Rape of a Child in the First Degree and Incest in the First Degree. CP 1-4, 9-11, 13-15. He pled guilty to Child Molestation in the First Degree in the amended information. CP 24-39.

At the sentencing hearing, there was some confusion as the court was looking for the crime-related prohibitions that should have been in an

attached Appendix 4.2. RP 43.

THE COURT: All right. There is a, there is a number of crime-related prohibitions. They are set forth in the appendices. ***Actually, I don't see a 4.2 in here.***

MS. MULHERN: No. We have attached appendix F.

THE COURT: Okay. It is included in appendix F?

MS. MULHERN: Yes.

THE COURT: All right. I'll change that in the form then; it still says 4.2. All right. And I am signing the appendix F. ...

RP 43 (emphasis added). Relying on the State's representation and mistakenly believing that Appendix F was the same thing, the court crossed out "4.2" and replaced it with "F." CP 127.

When the prosecutor realized she had misspoken, the matter came back for rehearing to enter Appendix 4.2. RP 46.

The prosecutor explained that she had unintentionally misled the court:

I had thought the conditions were included in the main body of the Judgment and Sentence but ***it turns out that was only if Mr. Smith would have gotten a prison sentence so we need to have the appendix 4.2 to cover all the community conditions while Mr. Smith is out on SSOSA.*** I had sent an order over as soon as I was made aware of the issue over to Mr. Makus. He had indicated earlier in the day that he would look at it and sign it, however, when my order came back he had refused to sign it. So I would ask that the Court add the appendix 4.2, ***the usual conditions, to insure that Mr. Smith is adequately supervised.***

RP 46 (emphasis added).

It was a simple oversight by the State. As I said, I thought all the conditions were contained in the body of the Judgment and Sentence which is why I didn't think we needed appendix 4.2 based on my review of the Judgment and Sentence. However, *what I didn't realize is those very same conditions that were contained in the body of the Judgment and Sentence or the section, were the section of the body of the Judgment and Sentence that were only applicable for a prison sentence, not SSOSA sentence.* I can also use my experience in 20 years we have never done a SSOSA without 4.2. It needs to be added to this Judgment and Sentence so Mr. Smith can be adequately supervised. That is also part of the law.

RP 48 (emphasis added).

Because defense counsel had lost track of his client, the matter was rescheduled for the Defendant's presence. RP 47 ("I haven't seen him since and I don't know where he is"); RP 49 (court requesting that Defendant be cited into court).

For the continued hearing, the parties filed briefs. CP 149-53, 154-80, 181-84. The defense admitted that the DOC was separately authorized to impose the same conditions that the court would order in Appendix 4.2. CP 154-55; RP 57. And the DOC and the prosecutor agreed. RP 55-56.

The prosecutor again explained that she had inadvertently misrepresented to the court that the appendix the judge explicitly requested

was included in the orders he was signing. CP 150-51.

I mistakenly thought as I was reviewing the J and S that that there was a whole section within the body of the Judgment and Sentence that covered all of the restrictions primarily the prohibitions that are usually covered in appendix 4.2 and I know the Department of Corrections also submits its appendix F as well to be attached. So it was my mistaken belief that the usual conditions were going to be covered by the Judgment and Sentence itself.

RP 50-51.

It wasn't a mistake of law that I thought we didn't need to have the conditions at all. I thought they were already included in the body of the Judgment and Sentence. ... What I didn't realize is the section that I was looking at was the section for the probation requirements if Mr. Smith had been sentenced to a prison term instead of a SSOSA. ... [M]y mistake was simply thinking that one section of the Judgment and Sentence covered everything and in fact it didn't. ... It is a clerical mistake, a misreading how the parts of the Judgment and Sentence were to go together.

RP 53-54.

THE COURT: Okay. Then I asked about it, and relied on your statements, so then it became my mistake then.

....

I'm just articulating what happened.

....

And I think Mr. Makus recognizes that in his last document his objections only raise particular objections to [some of the individual conditions in] 4.2.

RP 55. “And frankly, I’m satisfied that it is a clerical error under 78, or 7.8A, and I’m going to enter appendix 4.2 on that basis.” RP 63. The court then addressed the Defendant’s objections to specific conditions within that section. RP 63-65. The court amended the sentence to include Appendix 4.2. CP 190; RP 65.

V. ARGUMENT

THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE OMISSION OF APPENDIX 4.2 COULD BE CORRECTED UNDER THE AUTHORITY OF CrR 7.8.

The Defendant challenges the court’s decision to amend the judgment to add Appendix 4.2. A ruling on a motion to correct sentence is reviewed for abuse of discretion. *State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (2011). A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds. *State v. Smith*, 159 Wn. App. at 699-700. It is appropriate to amend a judgment that does not carry out the court’s intent. *Id.*

The superior court ruled that it was amending the judgment under CrR 7.8(a). RP 63. Under CrR 7.8(a), a superior court may amend a judgment for clerical error arising from oversight or omission and corrected after such

notice as the court orders. As the Defendant notes, an error is clerical if the judgment does not embody the court's intention. BOA at 6 (quoting *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100, 103 (1996)). Here there was an oversight or omission. There is a standard court form for a SSOSA sentencing which includes an extensive checklist under section 4.2a. CR 84.0400 SOSA.¹ The court believed the standard conditions were within the document it was signing. It intended to enter those conditions. It relied upon the prosecutor's representation. The prosecutor made a mistake and misrepresented what was in the order.

The Honorable Judge Lohrmann knows better than any party what he intended here. He enunciated his intention in his ruling to amend the judgment. This is more than tenable in consideration of the record. The judge had asked for the standard appendix. While 4.3(d) in the main body of the judgment places the Defendant on community custody (CP 189), it is 4.2 that requires the Defendant to report to his CCO and follow the direction of his CCO. CP 193. It is in this section/appendix that the standard conditions of every probation situation, as well as some additional ones, are located.

Appendix 4.2 requires the Defendant:

¹ Available at <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18>

- Report to his CCO and participate in programs which the CCO deems necessary;
- Obey the law;
- Maintain full employment or education;
- Not change employment, schooling, or residence without CCO permission;
- Not use, possess, or sell unlawful controlled substances and marijuana;
- Submit to reasonable searches and consent to home visits;
- Not associate with persons on probation or parole;
- Submit to polygraphs and urinalyses upon CCO request;
- Not leave the county or state without CCO permission;
- Not purchase, use, own, or possess firearms, ammunition, or explosives;
- Obtain a chemical dependency assessment and comply with all recommendations;
- Sign an assignment of wages to pay LFO's if requested;
- Pay all LFO's;
- Not contact the victim or her immediate family;
- Not reside in a community protection zone or in an unapproved residence;
- Not use or possess specified obscene materials.

CP 193-95. The additional conditions in Appendix F (CP 130, 196) did not include the very standard ones in 4.2.

At the original sentencing hearing, Judge Lohrmann noted that he was surprised the CCO would recommend a SSOSA in this case. RP 40. He saw red flags, and he found it difficult to believe some of the Defendant's claims. RP 40. The judge eventually decided to permit the SSOSA, but only as "a short leash." RP 41. He said he intended to revoke the sentence and impose "the full 68 months" for a violation "of any of these conditions." RP 41.

That being the case, it is not reasonable to believe that the court intended that this sex offender should not be subject to the standard conditions which would allow the CCO to supervise him fully and in the interest of community safety.

The court did not abuse its discretion in interpreting its own apparent, expressed, and reasonable intent.

As the Defendant notes, there are other sections of CrR 7.8 that may also apply. Opening Brief of Appellant (BOA) at 4 (quoting CrR 7.8(b)(1) and (5)). And an appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Glenn*, 140 Wn. App. 627, 636, 166 P.3d 1235, 1239 (2007).

A court may amend for mistakes, inadvertence, excusable neglect, or irregularity in its obtaining. CrR 7.8(b)(1). There was clearly inadvertence here. The court intended to enter the standard conditions and requested the appropriate form. The judge was misled that the content he was seeking was in the document he was signing. It was not.

A court may amend for any reason justifying relief from the operation of the judgment CrR 7.8(b)(1) and (5); *State v. Smith*, 159 Wn. App. at 700 (relief under CrR 7.8(b)(5) is limited to extraordinary circumstances not

covered by any other section of the rule). As all parties noted, this appendix memorialized in the most formal of documents the restrictions which the DOC was authorized to require. Therefore, this amendment clarified in this formal way a restriction that could also be implemented by the DOC.

The Defendant argues that *if* the court found that this was excusable neglect, the rule of lenity requires that excusable neglect never be interpreted in the State's favor. CP 157 and BOA at 5,7 (citing *State v. Quintero Morelos*, 133 Wn. App. 591, 137 P.3d 114 (2006) and *State v. Gomez-Florencio*, 88 Wn. App. 254, 945 P.2d 228 (1997)). This argument is not persuasive.

First, because the lower court's ruling did not rely on a finding of excusable neglect. The court's intention was frustrated by the prosecutor's misrepresentation. What was dispositive of the issue was *the court's intent*, not the prosecutor's oversight.

Second, this interpretation of case law is error. In *State v. Gomez-Florencio*, 88 Wn. App. 254, 945 P.2d 228 (1997), after the defendant was sentenced and his fingerprints were taken, the prosecutor discovered additional criminal history and sought to amend the sentence with the correct offender score. The prosecutor argued he could not have discovered this

history prior to the fingerprinting, because the defendant's previous convictions had been under different names. *State v. Gomez-Florencio*, 88 Wn. App. at 256. The court of appeals noted that "excusable neglect" normally refers to the court's neglect, not an attorney's. *State v. Gomez-Florencio*, 88 Wn. App. at 259 (citing *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040, review denied, 129 Wn.2d 1028, 922 P.2d 98 (1996)). But ultimately, the court was simply not satisfied that a sufficient factual record had been made at the trial court to demonstrate that the prosecutor's neglect was excusable or that the defendant had committed fraud. *State v. Gomez-Florencio*, 88 Wn. App. at 260.

At the time, Judge Brown dissented, noting that a trial court acts without authority when imposing a sentence based on a miscalculated offender score. *State v. Gomez-Florencio*, 88 Wn. App. at 231-32 (Brown, J., dissenting). This would be prescient.

In *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283, 284 (2014), the defendant argued that at a re-sentencing hearing, the State could not bring in new evidence to support its position on the offender score. The defendant argued a common law rule of lenity also known as the "no second chance" rule. The *Cobos* court noted that the "no second chance" rule had been

superseded by statute. The state will not be held to the errors of its attorneys at the cost of the legislative directives for sentencing.

In *State v. Quintero Morelos*, *supra*, the defendant was acquitted of attempted rape and indecent liberties and convicted only of assault in the fourth degree with domestic violence. This was in 2003 when the maximum penalty for a gross misdemeanor was 365 days, before the 2011 amendment of RCW 9A.20.021(2). LAWS OF 2011, ch. 96, § 13. The defense attorney failed to recommend a sentence that would lessen the possible immigration consequences on his client. The defense attorney noted a new hearing and requested the court amend the sentence for his own excusable neglect. The *Quintero Morelos* opinion discussed a different factual circumstance not before it, that of a prosecutor seeking to increase a sentence. Inasmuch as this question was not before it, this was dictum. Discussing *State v. Gomez-Florencio*, the *Quintero Morelos* court commented:

In *Gomez-Florencio*, the *State* was trying to *increase* a sentence after it belatedly discovered additional criminal history. But there the excusable neglect provision was not interpreted in the State's favor. Nor will it ever be. The rule of lenity has no comparable principle in favor of the State because the State has no liberty deprivation at stake. Moreover, the incompetence by one's own lawyer is very different when the one upon whom the incompetence is being visited is a criminal defendant.

State v. Quintero Morelos, 133 Wn. App. at 597–98 (citations omitted). The comment was gratuitous. The *Gomez–Florencio* ruling regarding excusable neglect was based on an inadequate record of excusable neglect, not on the identity of the neglectful party. Moreover, the *Gomez–Florencio* ruling would be superseded by LAWS OF 2008, ch. 231, § 1, amending RCW 9.94A.530(2) – thus undercutting the rationale in the dictum.

Because the record supports the court’s tenable finding of mistake, the court did not abuse its discretion in amending the judgment to add standard conditions of community custody in a SSOSA.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s sentence.

DATED: June 17, 2017.

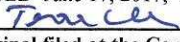
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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